

**United States Department of Labor
Employees' Compensation Appeals Board**

K.M., Appellant

and

**U.S. POSTAL SERVICE, FOX CREEK
STATION, Detroit, MI, Employer**

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**Docket No. 12-726
Issued: January 22, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 14, 2012 appellant, through her attorney, filed a timely appeal of the December 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her recurrence claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

On appeal, appellant's attorney contends that OWCP's December 23, 2011 decision is contrary to fact and law.

ISSUE

The issue is whether appellant sustained a recurrence of total disability commencing February 14, 2011 causally related to her accepted January 25, 2011 employment injuries.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on January 25, 2011 appellant, then a 59-year-old letter carrier, sustained a bilateral hip and thigh contusion when she slipped and fell backwards onto snow and ice as she unloaded mail.

In a medical report and an authorization for examination and/or treatment (Form CA-16) dated January 27, 2011, Dr. Kimberly M. Winston-Matthews, a Board-certified family practitioner, advised that appellant sustained a low back and bilateral hip contusion due to a fall at work. She further advised that appellant could not work from January 25 through February 13, 2011. Dr. Winston-Matthews stated that appellant could return to work on February 14, 2011 with restrictions which included no lifting more than 10 pounds and no repetitive squatting, bending or lifting through February 20, 2011. Appellant could resume her full workload and activities effective February 21, 2011.

On February 15, 2011 the employing establishment offered appellant a modified letter carrier position based on the medical restrictions set forth by Dr. Winston-Matthews which she refused on that date.

In a February 14, 2011 report, Dr. Marlyn G. Generillo, a family practitioner, advised that appellant could return to work on February 14, 2011 with restrictions. Appellant could not lift more than 10 pounds or engage in repetitive squatting, bending or lifting through February 28, 2011. In a February 17, 2011 report, Dr. Generillo advised that appellant was unable to work from February 14 through 26, 2011.

On March 3, 2011 Dr. James C.C. Leisen, a Board-certified internist, reported that appellant had lumbago. He advised that she could not work from March 3 to 25, 2011.

By letter dated March 25, 2011, OWCP advised appellant that it had received her claim (Form CA-2a) alleging a recurrence of disability commencing February 14, 2011.² It addressed the factual and medical evidence she needed to submit in support of her recurrence claim.

In an April 18, 2011 letter, appellant stated that her medical documentation established that she had a contusion of the back and bilateral hips while OWCP accepted her claim for a contusion of the bilateral hip and thigh. She contended that this was a serious problem because management would not accept her medical restrictions arising from her back condition. Appellant's hip condition occasionally bothered her while her back condition was her primary problem and had bothered her night and day since the date of injury. She contended that the duties of the offered position were not within her physical restrictions. Appellant tried to case mail on February 14 and 15, 2011, but experienced pain after her attempt. She also experienced pain while bending over and picking up tubs of mail. Appellant worked hard to set up the mail within the allotted time. She stated that, since a full tub of mail was much heavier than 10 pounds, she had to bend and squat continuously to remove and prepare the mail for casing. Appellant related that her route, in Grosse Pointe, involved extremely heavy mail, particularly, flats. A 10-pound restriction was unrealistic. Appellant stated that sometimes a single residence received that much mail and a school received a full heavy tub of mail. She refused the job offer

² The Board notes that the Form CA-2a is not contained in the case record.

because delivering mail on her route would exceed her medical restrictions. On March 1, 2011 appellant returned to work and unsuccessfully tried to set up and deliver her route. Management relieved her from working the last two hours of her shift. Following an evaluation by a back specialist, appellant was restricted from repetitive squatting, bending, lifting, twisting and pulling.

In a May 2, 2011 letter, appellant stated that she returned to work on March 28, 2011 with restrictions which included no repetitive bending, squatting, twisting, turning, pulling, pushing and no lifting more than 10 pounds. She further stated that on April 5, 2011 Ms. Hayes, a supervisor, instructed her not to return to work because the employing establishment could no longer accommodate her restrictions.

On May 6 and 27 and June 17, 2011 appellant filed claims for wage-loss compensation (Form CA-7) from January 26 to July 15, 2011.

A magnetic resonance imaging (MRI) scan of the lumbar spine was requested by Dr. Shlomo S. Mandel, a Board-certified internist, and performed on April 26, 2011. The MRI scan demonstrated lower lumbar degenerative disc disease and facet arthropathy without significant central canal stenosis, left paracentral disc protrusion at L5-S1 that mildly narrowed the left lateral recess with mass effect on the traversing left S1 nerve root and moderate to severe bilateral neural foraminal narrowing at L5-S1 that caused mass effect on the exiting bilateral L5 nerve roots.

A report signed by Dr. Mandel on May 6, 2011 and by Dr. Rachel B. Hertzberg Hulen, a Board-certified radiologist, on April 27, 2011 listed findings on physical examination. The physicians reviewed the April 26, 2011 lumbar MRI scan report and a January 27, 2011 lumbar x-ray which showed spondylosis and atherosclerosis. Dr. Mandel and Dr. Hulen advised that appellant was not suitable for employment that involved bending, twisting or lifting.

In a July 19, 2011 decision, OWCP denied appellant's recurrence of disability claim. It found no rationalized medical evidence to support that the claimed recurrence was causally related to the accepted January 25, 2011 employment injuries.

By letter dated July 27, 2011, appellant, through her attorney, requested a telephone hearing with an OWCP hearing representative.

A January 27, 2011 report from Dr. Joseph G. Craig, a Board-certified radiologist, advised that x-rays of the bilateral hips revealed no fracture, subluxation or discoloration. Asymmetric degenerative changes were noted at L4-5 with prominent spurring on the right.

In another January 27, 2011 report, Dr. Hakmin Park³ advised that an x-ray of the lumbosacral spine demonstrated degenerative changes.

In reports dated February 14 and September 8, 2011, Dr. Frances L. Hewitt, a Board-certified family practitioner, obtained a history of the January 25, 2011 employment injuries and diagnosed low back pain. She advised that appellant required light-duty work with restrictions. During a February 17, 2011 telephone conversation, Dr. Hewitt was advised by appellant that her

³ The Board notes that the professional qualifications of Dr. Park are not contained in the case record.

job would not allow her to perform light-duty work. She either had to be off work or perform her usual work duties. Appellant still had back pain. She asked Dr. Hewitt to place her off work until February 28, 2011 since she was not allowed to perform light-duty work.

In a March 3, 2011 report, Dr. Leisen reiterated his prior diagnosis of lumbago.

In reports dated March 23 through November 28, 2011, Dr. Mandel noted appellant's complaints of low back pain following the January 25, 2011 employment injuries. He listed physical and neurological examination findings. Dr. Mandel reviewed x-ray results and advised that they showed some degenerative changes and dextroconvex curvatures, but there was nothing clearly impinging on the nerve. He established light-duty work restrictions and addressed appellant's treatment plan. In the November 28, 2011 report, Dr. Mandel stated that appellant attributed her lower back pain and symptoms to her January 25, 2011 employment-related fall.

In reports dated March 29, April 7 and August 16, 2011, Dr. Winston-Matthews reported that appellant had a history of low back and hip pain after her January 25, 2011 employment injuries and low bone mass. She provided physical examination findings and diagnosed low bone mass, degenerative joint disease, lumbago and lumbar disc disease. In the March 29, 2011 report, Dr. Winston-Matthews advised that appellant had a work-related injury. She gave appellant a work note for the employing establishment as she still had intermittent pain. On June 8, 2011 Dr. Winston-Matthews reported findings on physical examination and advised that appellant had symptoms of depression and uncontrolled hypertension.

An unsigned report dated April 8, 2011 which contained the typed name of Dr. Dhanwada S. Rao, a Board-certified internist, stated that appellant had low bone mass and low back pain.

In reports dated June 15, 2011, Phillip J. Lanzisera, Ph.D. and Dr. Augusto M. Jamora, a Board-certified psychiatrist, advised that appellant had recurrent episodes of moderate major depression and anxiety disorder not otherwise specified on Axis 1, hypertension, degenerative joint disease and back pain on Axis 3 and occupational problems and conflict with daughter on Axis 4. The physicians deferred a diagnosis on Axis 2. Dr. Lanzisera did not provide a global assessment functioning (GAF) score on Axis 5 while Dr. Jamora reported a present GAF score of 60 and a past GAF score of 65.

An August 11, 2011 lumbar MRI scan was interpreted by Dr. Hulen and signed by Dr. Winston-Matthews as showing the same findings as the April 26, 2011 lumbar MRI scan.

In a September 8, 2011 report, Dr. Keiko A.D. Hendrick, a family practitioner, obtained a history of the January 25, 2011 employment injuries and noted appellant's complaint of low back and bilateral hip pain. She listed findings on physical examination and diagnosed multiple level spondylosis, left L5-S1 foraminal stenosis, lumbago and lumbar disc displacement. Dr. Hendrick advised that appellant was unable to perform her required work duties. She opined that the accepted injuries caused the onset of appellant's back pain and inability to perform her required work duties. Dr. Hendrick concluded that appellant had documented degenerative joint disease in the lumbar spine but did not experience pain until after the accepted injuries.

An October 17, 2011 report contained the typed name of Dr. Dariush Zandi, a Board-certified family practitioner, and stated that appellant had lower back pain. Appellant had

degenerative changes which were related to aging. It was difficult to determine whether her back condition was secondary to work.

Unsigned reports dated October 9, 2001 through June 17, 2002 which contained the typed names of Dr. Denise D. Collins, a Board-certified radiologist, Dr. Zandi, Dr. Rahul Vaidya, a Board-certified orthopedic surgeon, Dr. Mirza Adnan Hassan Beg, a Board-certified family practitioner, and Dr. Owen E. McCormack, a Board-certified family practitioner, addressed appellant's back, left upper extremity and gynecological conditions, medical treatment and work capacity.

In a December 23, 2011 decision, an OWCP hearing representative affirmed the denial of appellant's recurrence claim based on insufficient evidence establishing that her current medical condition and disability resulted from the accepted January 25, 2011 work injuries. The hearing representative found that the claimed disability was attributed to a back condition that had not been accepted by OWCP.⁴

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁵ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁶

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.⁷

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the

⁴ Following the issuance of OWCP's December 23, 2011 decision, appellant submitted new evidence. However, the Board cannot consider evidence that was not before OWCP at the time of the final decision. See 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁵ 20 C.F.R. § 10.5(x).

⁶ *Id.*

⁷ *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.⁸

ANALYSIS

The Board finds that the case is not in posture for a decision as to whether appellant sustained a recurrence of disability. OWCP accepted that appellant sustained a bilateral hip and thigh contusion while working as a letter carrier on January 25, 2011. Following this injury, it appears from the record that she returned to modified-duty work. Appellant filed a recurrence claim for total disability commencing February 14, 2011. She contended that she did not sustain a bilateral thigh contusion and instead attributed her claimed disability to an alleged work-related back contusion and the accepted bilateral hip contusion.

The record reflects that appellant received treatment from a multitude of physicians and healthcare providers. The medical evidence relevant to the alleged employment-related back condition and claimed resultant period of disability includes the March 29, 2011 report in which Dr. Winston-Matthews opined that appellant had a work-related lumbar degenerative disc disease. She provided a history that appellant had back and hip pain following the accepted January 25, 2011 injuries. Dr. Winston-Matthews gave appellant a work note for her employer. In a September 8, 2011 report, Dr. Hendrick opined that the onset of appellant's back pain and inability to perform her required work duties were due to the accepted January 25, 2011 employment injuries. She noted appellant's complaints of low back and bilateral hip pain. Dr. Hendrick diagnosed multiple level spondylosis, left L5-S1 foraminal stenosis, lumbago and lumbar displacement. She stated that appellant had documented degenerative joint disease in the lumbar spine, but did not have pain until after the accepted injuries. The Board finds that the reports of Dr. Winston-Matthews and Dr. Hendrick are generally supportive of appellant's recurrence claim. Although these reports are not sufficiently rationalized to carry appellant's burden of proof in establishing her claim,⁹ the Board finds that they are of sufficient quality to require further development of her claim by OWCP.¹⁰

It is well established that proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter.¹¹ While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹² The case shall therefore be remanded to OWCP. On remand, OWCP shall refer appellant, an updated statement of accepted facts and the medical evidence of record to an appropriate Board-certified specialist for an examination, diagnosis and a rationalized opinion as to whether appellant sustained a back condition and any resultant disability commencing February 14, 2011 due to the accepted bilateral hip and thigh contusion. Moreover, as appellant

⁸ *James H. Botts*, 50 ECAB 265 (1999).

⁹ *See Frank D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989); *see also Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987); *Horace Langhorne*, 29 ECAB 820 (1978).

¹¹ *John W. Butler*, 39 ECAB 852 (1988).

¹² *Donald R. Gervasi*, 57 ECAB 281 (2005); *William B. Webb*, 56 ECAB 156 (2004).

contends that her supervisor advised of the employing establishment's withdrawal of light duty, OWCP should verify this and consider whether FECA Bulletin No. 09-05 (issued August 18, 2009) is applicable. The FECA Bulletin No. 09-05 outlines OWCP procedures when limited-duty positions are withdrawn pursuant to the National Reassessment Process and no loss of wage-earning capacity determination has been issued.¹³ After this and such further development as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant established that she was totally disabled commencing February 14, 2011 due to the January 25, 2011 accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: January 22, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹³ See FECA Bulletin No. 09-05 (issued August 18, 2009), §§ I.B.1-3.